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No. 88-1242

In The

Supreme Court of the United States

October Term, 1988

JACK R. HUGHES and MERLE A. PETIT,

Petitioners,

v.

GENERAL MOTORS CORPORATION, a Delaware Corporation, THE GENERAL MOTORS RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, and THE FINANCE COMMITTEE OF GENERAL MOTORS CORPORATION, jointly and severally,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY MEMORANDUM

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ARGUMENT

In Part 4 of their argument in opposition to the petition, Brief in Opp., pp. 6-10, Respondents rely on three decisions of this Court in support of their argument that a federal common law remedy not only *should not* be fashioned to provide some relief to Petitioners, such a remedy *cannot* be fashioned. Respondents' reliance on

these cases is misplaced. The authority to fashion a common law clearly exists and should be exercised here.

The three cases relied upon by Respondents are inapposite. In fact, *Texas Industires, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S. Ct. 2061 (1981); *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 101 S. Ct. 1571 (1981); and *Wheeldin v. Wheeler*, 373 U.S. 647, 83 S. Ct. 1441 (1963), all support Petitioners' position.

Each of these cases deals with the availability of federal common law remedies under statutory schemes or an alleged federal right much less comprehensive than the statutory scheme under the Employee Retirement Income Security Act of 1974 ("ERISA"). *Texas Industries* dealt with an antitrust claim, *Northwest Airlines* dealt with claims under the Equal Pay Act and Title VII of the Civil Rights Act of 1964, and *Wheeldin* dealt with a claim arising out of improper use of a congressional subpoena. These cases did not involve the same underlying considerations presented in a case arising under ERISA.

In each of these three cited decisions the Court used *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912 (1957), as an example of a situation where a federal common law remedy *could* be fashioned. *See Texas Industries*, 451 U.S. at 642-43, 101 S. Ct. at 2068; *Northwest Airlines*, 451 U.S. at 96 n. 35, 101 S. Ct. at 1583 n. 35; *Wheeldin*, 373 U.S. at 651-52, 83 S. Ct. at 1445. The distinction between *Lincoln Mills* and the three cases cited by Respondents is of critical importance in the instant case because of the parallel which this Court has acknowledged exists between the preemptive scope of ERISA and the preemptive scope of section 301(a) of the

Labor Management Relations Act, 29 U.S.C. § 185(a). *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 107 S. Ct. 1549, 1557 (1987).

Contrary to Respondents' argument, Congress *did* authorize the fashioning of federal common law remedies under ERISA. In his remarks to the Senate in presenting the Conference Report on ERISA, Senator Javits, one of the principal sponsors of ERISA in the Senate and the ranking minority member on the Senate Committee on Labor and Public Welfare, indicated that ERISA was intended to have a very broad preemptive effect and went on to state:

> In view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans – unless a criminal statute of general application – establishing State termination insurance programs, et cetera, will be superseded. It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.

120 Cong. Rec. 29942 (1974). A grant of authority to fashion federal common law remedies could not have been given much more explicitly. *See also* H.R. Conf. Rep. No. 1280, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5107 (actions enforcing rights under ERISA or under benefit plans "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947"). Congress intended that federal common law remedies be fashioned

to replace state remedies, not that ERISA would extinguish them.

At least four Justices have acknowledged the availability of federal common law remedies under ERISA. In his concurring opinion in *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 105 S. Ct. 3085 (1985), Justice Brennan was joined by Justices White, Marshall and Blackmun. In that concurrence, Justice Brennan pointed out the narrow grounds on which *Russell* was decided, 473 U.S. at 150-51, 105 S. Ct. at 3095, and stated that "ERISA was *not* so 'carefully integrated' and 'crafted' as to preclude further judicial delineation of appropriate rights and remedies; far from having such a process, the statute explicitly directs that courts shall undertake it." 473 U.S. at 157, 105 S. Ct. at 3098 (emphasis in original). This case presents the Court with an opportunity to define the scope of federal common law remedies which may be fashioned under ERISA.

CONCLUSION

Respondents do not dispute the fact that, prior to the passage of ERISA, Petitioners' complaint would have made out claims for fraud, misrepresentation and breach of fiduciary duty under the common law of the State of Michigan. Nor do Respondents dispute the fact that ERISA is a remedial statute which is to be construed broadly to effect its remedial purpose. Implicit in Respondents argument, however, is the claim that the effect of ERISA's enactment is to extinguish all remedies under which Petitioners might seek relief.

With a Michigan court already having determined that Petitioners' claims are preempted by ERISA, allowing the Sixth Circuit's decision to stand in the instant case is logically insupportable. A remedy for the wrongs alleged by Petitioners must exist somewhere. According to the legislative history of ERISA and the decisions of this Court, that remedy exists under federal common law. Only a federal common law remedy will provide relief to Petitioners while at the same time avoiding "the threat of conflicting or inconsistent State and local regulation of employee benefit plans" feared by Congress. 120 Cong. Rec. 29933 (1974) (Remarks of Senator Williams).

This case is before the Court to review the trial court's granting of summary judgment in Respondents' favor. Taking the facts in the light most favorable to Petitioners, it must be presumed that Respondents acted intentionally to prevent Petitioners from becoming eligible for special early retirement benefits at a time when those benefits were under serious consideration. For purposes of this Court's review, Respondents through their duly authorized agents intentionally misled Petitioners about these benefits. To allow the Sixth Circuit's decision to stand means that, as Respondents appear to argue, ERISA may be used to protect unscrupulous employers from liability for such actions notwithstanding the fact that ERISA was intended to be "the greatest development in the life of the American worker since social security." 120 Cong. Rec. 29933 (1974) (Remarks of Senator Javits). The result sought by Respondents is totally contrary to the purposes of ERISA.

RELIEF REQUESTED

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Dated: February 24, 1989

Respectfully submitted,

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